Supreme Court U.S.
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No. 01-1144

IN THE

Supreme Court of the United States

RICHARD GILLIS, MICHAEL HANLON, PAUL RENNIE, AND JOYCE WEIGERS,

Petitioners,

v.

JASON DAVIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Petitioners have raised the following questions through their Petition:

1. Whether a standard higher than "objectively reasonable" is required for determining whether State hospital workers have committed a constitutional violation when they fail to intervene to prevent an assault by a co-worker upon an involuntarily committed mental patient.

2. Whether a constitutional violation for the use of excessive force upon the involuntarily committed can arise where the resulting injury to the patient is solely psychological in nature.

3. Whether a standard higher than "objectively reasonable" is required for determining when the use of excessive force used by a non-professional State hospital worker to restrain an involuntarily committed mental patient is constitutionally excessive.

4. Whether in August of 1993 it was clearly established that State hospital workers had a constitutional duty to intervene to prevent an assault by a co-worker upon an involuntarily committed mental health patient.

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STATEMENT OF THE CASE

Jason Davis ("Davis") was born on August 14, 1965. He has been institutionalized for nearly his entire adult life due to a variety of acute psychiatric disorders from which he has long suffered including Schizoaffective Disorder Bipolar Type I, depression and various substance abuse disorders. Davis was an involuntarily committed inpatient at the Westborough State Hospital on August 12, 1993. He commenced an action in the United States District Court for the District of Massachusetts on August 2, 1996 which such action was presided over by Senior District Judge Morris E. Lasker. Davis' claims sounded in 42 U.S.C. §1983 and were predicated upon excessive force and the failure of State hospital employees to intervene while one of their own savagely beat Davis bloody on August 12, 1993.

The Petitioners consist of a Charge Nurse, Joyce Weigers ("Weigers"), and three Mental Health Care Workers each of whom were employed at the Westborough State Hospital on August 12, 1993. Three of the Petitioners, Richard Gillis ("Gillis"), Michael Hanlon ("Hanlon") and Paul Rennie ("Rennie"), were found by the jury to have pinned Davis to the floor to perpetuate the ability of another employee, Phillip Bragg, to brutalize him on August 12, 1993. All four Petitioners were found by the District Court jury to have failed to intervene to stop the carnage. Rennie was also found liable for having employed excessive force upon Davis during a separate incident occurring in a Seclusion Room prior to the primary assault.

The jury returned its verdict on October 28, 1998 by awarding $100,000.00 in compensatory damages

against the Petitioners and punitive damages in the following amounts[1]:

PETITIONER	AMOUNT
Rennie	$250,000
Gillis	$100,000
Hanlon	$100,000
Weigers	$500,000

The punitives were later remitted by a factor of fifty percent by the District Court. The remittitur was accepted by Davis. The District Court denied the Petitioners' motion for a new trial and their renewed motion for judgment as a matter of law. The Petitioners then appealed to the United States Court of Appeals for the First Circuit ("First Circuit"). The First Circuit affirmed the judgment of the District Court. See Davis v. Rennie, 264 F.3d 86 (1st Cir. 2001).

The Petitioners claim that the jury instructions, employed relative to the compensatory claims, were erroneous and there was "no case" which would have placed them "on notice" for purposes of the determination as to whether or not their actions were qualifiedly immune. Each of these contentions are wholly devoid of both factual and legal merit. The Petitioners raised no compelling legal issues.

REASONS FOR DENYING THE WRIT

I. ANY ALLEGED CLAIMS OF ERROR, PERTAINING TO THE JURY INSTRUCTIONS, WERE HARMLESS IN RELATION TO ALL FOUR PETITIONERS INSOFAR AS THE JURY EXPRESSLY FOUND THAT THEIR CONDUCT

[1] The jury awarded a total of $1,550,000 in punitive damages. Thus, additional punitive damages of $600,000 were assessed against others not named as Petitioners in this action.

SATISFIED THE HIGHEST STANDARD IN THE CIVIL LAW

The Petitioners argue that the jury instructions on the compensatory claims were erroneous because the standards of liability employed by the District Court were too lenient. These contentions have no merit for a variety of reasons. The District Court's punitive damage instruction reads as follows:

> Now I will discuss Plaintiff's claims for punitive damages. Punitive damages, distinct from compensatory damages, are damages awarded for the purpose of punishing a defendant and to create an example which will deter him and others from repeating such conduct in the future. It is entirely up to you to decide whether or not punitive damages should be awarded. In this respect you have considerable discretion. You may decide that even though compensatory damages have been awarded, you believe that no punitive damages are called for. On the other hand, you may feel that punitive damages are in order, so as to punish the defendants and to create an example which will deter them and others. Punitive damages are not awarded as a matter of right but are awarded only if you believe that the defendants acted so outrageously and evidenced such a degree of malice or callousness that they deserve to be punished, and that an example and deterrent is necessary to make sure that these defendants and others will be less likely to engage in such conduct in the future. You may award punitive damages if you find that the defendant in question acted maliciously or wantonly. That is, if their acts were prompted by ill will. (emphasis added).

The jury necessarily found that the Petitioners acted

outrageously, maliciously, callously and wantonly and that their actions "were prompted by ill will".

The Petitioners contend that the jury should have been charged on the "shocks the conscience"[2] standard concerning Plaintiff's "intervention claim". See Lewis, 523 U.S. 833. They claim that this standard, not the "objectively reasonable" standard utilized in pre-trial detainee/arrestee "excessive force" cases, should have been employed. See Graham v. Connor, 490 U.S. 386, 395-398 (1989). The Petitioners also concurrently contend that some other heightened standard – other than the "objectively reasonable" standard – should have been employed as well.

The finding by the jury that all four of the Petitioners acted outrageously, maliciously, callously, wantonly and with ill will dictates that their level of culpability actually eclipsed that which is necessary to prove "conscience shocking", "deliberately indifferent" or "objectively unreasonable" conduct. Thus, any alleged error, concerning the standards of liability upon which the jury was instructed in relation to the compensatory claims, is necessarily harmless given the satisfaction of the highest standard in the civil law.

Even if this Court were to rule that Petitioners' conduct should have been measured by the "shocks

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[2]The Petitioners are actually without the legal ability to viably assert that the "shocks the conscience" standard is applicable to the intervention and excessive force claims asserted by Davis given the fact that the Supreme Court has expressly held it to be inapplicable when: (1) a "seizure" has taken place; or (2) when the victim is an involuntarily committed inpatient at a State operated mental institution. Both of these conditions existed here. See §III; see also County of Sacramento v. Lewis, 523 U.S. 833, 844-846, 852 & n.12 (1998).

the conscience" or some other heightened standard it is clear that the jury's verdict dictates that their conduct actually went well beyond any remaining standard in the civil law. The District Court noted that the "jury was justified in granting punitive damages ... to express its outrage at the behavior of the Defendants..." The First Circuit concurred. See Davis, 264 F.3d, at 115-117. The imposition of punitive damages renders harmless any claim of compensatory jury instruction error and it concurrently vitiates the ability to contend that any Petitioner is qualifiedly immune. See §VI.

II. IT IS ONLY THE "OBJECTIVELY REASONABLE" STANDARD WHICH COULD BE EMPLOYED IN THE MENTAL HEALTH CARE WORKER/NURSE – INVOLUNTARILY COMMITTED MENTAL PATIENT CONTEXT

The Petitioners contend that since a host of other Circuits have employed either an Eighth Amendment or some other heightened standard to excessive force claims – which have been asserted by pre-trial detainees, prisoners or others – then a substantial question of law exists in relation to what standard should be applied here. The Petitioners' "train", however, runs off the tracks at the outset. The Eighth Amendment is not the source of substantive rights for involuntarily committed inpatients as was expressly held by this Court in Youngberg v. Romeo, 457 U.S. 307, 312 & n.11, 315, 316-321 (1982). Thus, any Eighth Amendment standard is necessarily inapplicable in this Fourteenth Amendment context. Id., at 312 & n.11.

The First Circuit, like the Supreme Court and the District Court before it, merely held that involuntary patients are entitled to rights which are ***at least*** as expansive as those possessed by prisoners, arrestees, pre-trial detainees and those subject to an

investigative stop or other seizure. See Graham, 490 U.S., at 388; Youngberg, 457 U.S., at 315-316, 321-322; Davis, 264 F.3d, at 99-100, 115. The text of the First Circuit's opinion makes clear that it, in accord with Youngberg, held that the constitutional rights of involuntarily committed inpatients at State operated mental institutions are not relegated to legal standards employed in relation to Eighth Amendment prisoner claims. This Court in Youngberg expressly held that involuntarily committed inpatients are entitled to greater protections than prisoners "whose conditions of confinement are designed to punish". Youngberg, 457 U.S., at 321-322; see also Davis, 264 F.3d, at 99-100, 110, 115. "If it is cruel and unusual punishment to hold convicted criminals in unsafe conditions it must be unconstitutional to confine the involuntarily committed – who may not be punished at all – in unsafe conditions." Youngberg, 457 U.S., at 315-316. Since Graham dictates that claims of excessive force by those subject to investigatory stops, seizures or arrest are governed by an "objectively reasonable" standard it necessarily follows that involuntarily committed inpatient excessive force[3] claims must be measured by this same standard. If this standard did not apply then the incongruity foreclosed by Youngberg, 457 U.S., at 315-316, 321-322 would arise.

It is beyond cavil that both this Court in Youngberg and the First Circuit in Davis drew a sharp distinction between the rights of involuntarily committed inpatients and those of convicted criminals. See Youngberg, 457 U.S., at 312 & n.11, 315-316, 321-322; Davis, 264 F.3d, at 99-100, 115. In Davis, 264

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[3] The intervention claim was predicated upon the failure by State employees to intervene while one of their own was employing excessive force against Davis. See Gaudreault v. Municipality of Salem, Mass., 923 F.2d 203, 207 & n.3 (1st Cir. 1990). Thus, it too has as its predicate the employment of excessive force.

F.3d, at 99-100, the First Circuit held that "Davis was in the state's custody because of mental illness, not culpable conduct, and the trial court's decision to reject the 'shocks the conscience' standard is consistent with this distinction." Id., at 99. The Davis Court then cited with approval a quote from Andrews v. Neer, 253 F.3d 1052, 1061 (8th Cir. 2001): "'The Eighth Amendment excessive-force standard provides too little protection to a person whom the state is not allowed to punish.'" See Davis, 264 F.3d, at 100 (citations omitted). These holdings were necessarily predicated upon and compelled by the dictate of both Graham and Youngberg.

In the first paragraph of this Court's opinion in Graham it both framed the issue presented and answered the issue so framed:

> This case requires us to decide what constitutional standard governs a free citizen's claim that law enforcement officials used excessive force in the course of making an arrest, investigatory stop, or other 'seizure' of his person. We hold that such claims are properly analyzed under the Fourth Amendment's 'objective reasonableness' standard, rather than under a substantive due process standard.

Id., at 388.

It is of great consequence to articulate the parameters of the objectively reasonable standard in the context of an arrest, investigatory stop or seizure.[4] Graham, 490 U.S., at 386. To determine whether or not the physical force utilized is excessive under the Fourth Amendment "requires careful attention to the

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[4] Davis' Complaint was expressly predicated upon both the Fourth and Fourteenth Amendments to the United States Constitution.

facts and circumstances of each particular case..." Id., at 396. The general question becomes "'whether the totality of the circumstances justifie[s] [the] particular sort of ... seizure'" which was made. Id. (citing with approval Tennessee v. Garner, 471 U.S. 1, 8-9 (1985)). "[T]he 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officer's actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." Id., at 397. In Graham the Supreme Court held that:

> An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional.

Id.

The Graham Court went on to hold that any test, "which requires consideration of whether the individual officers acted in 'good faith' or 'maliciously and sadistically for the very purpose of causing harm,' is incompatible with a proper Fourth Amendment analysis". Id. Thus, arrestees and pre-trial detainees do not, in the excessive force context, have to demonstrate that police officers or prison guards act in an evil fashion or that they have engaged in conduct which is reckless, callous "conscience shocking" or deliberately indifferent. Graham takes intent, motivation, evil motive, illegal motive and ill will right out of the picture. Id.

It is manifest that the "objectively reasonable" standard is the only standard which could be applied to involuntarily committed inpatients' claims of excessive force if the rule of law established in Youngberg, 457 U.S., at 321-322 is to be honored. If

arrestees and pre-trial detainees[5] do not have to show intent to harm, motivation to harm, reckless conduct, deliberately indifferent conduct, callous conduct, "conscience shocking" conduct or the like then involuntarily committed inpatients likewise cannot be compelled to prove "underlying intent or motivation" in the context of their excessive force claims. Graham, 490 U.S., at 397. If involuntarily committed inpatients were compelled to comply with any of these other standards – as the condition precedent to maintaining excessive force claims – then they would be decidedly disadvantaged in relation to what arrestees and pre-trial detainees must demonstrate to prevail on an identical claim. Id.; Davis, 264 F.3d, at 115. Involuntarily committed patients would certainly not obtain greater "protections" than arrestees, pre-trial detainees or prisoners if they were required to prove "intent" and "underlying motivation" as part and parcel of their excessive force claims when arrestees, pre-trial detainees and prisoners do not have such obligations.

III. THIS COURT HAS PREVIOUSLY HAD OCCASION TO EXPRESSLY RULE THAT THE "SHOCKS THE CONSCIENCE" AND "DELIBERATE INDIFFERENT" STANDARDS ARE INAPPLICABLE IN THE PRESENT CONTEXT

The "deliberately indifferent" standard is actually foreclosed as a matter of law from being employed as the substantive standard in relation to Davis' excessive force claims for reasons other than those previously articulated. It is of initial moment to note that the First Circuit held that the Petitioners waived the right to have the jury charged on this standard.

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[5] Pre-trial detainees and arrestees are prisoners. If they can employ the "objectively reasonable" standard then involuntarily committed inpatients must be able to employ this same standard consistent with the dictate of Youngberg.

See §IV; Davis, 264 F.3d, at 100. This Court has also expressly ruled that the deliberate indifference standard is foreclosed as a matter of law from being applied to claims brought by involuntary inpatients as a result of inappropriate medical care:

> The 'deliberate indifference' standard was adopted by this Court in Estelle v. Gamble, 429 US 97, 104, 50 L Ed 2d 251, 97 S Ct, 285 (1976), a case dealing with prisoners' rights to punishment that is not 'cruel and unusual' under the Eighth Amendment. Although the District Court did not refer to Estelle v. Gamble in charging the jury, it erroneously used the deliberate indifference standard articulated in that case.

Youngberg, 457 U.S., at 312 & n.11 (emphasis added).

This Court has also previously held that the "shocks the conscience" standard is wholly inapplicable to claims asserted by involuntarily committed inpatients. Lewis, 523 U.S., at 852 & n.12. The Lewis Court was clear to hold that prisoners' claims "aris[ing] from normal custody..." and involuntarily committed inpatients' claims are not subject to this heightened "shocks the conscience" standard because, unlike prison riots and high speed car chases, there is not "'ordinarily a clash with [these] other equally important government responsibilities'". Lewis, at 852 & n.12, 853. (citation omitted).

This Court reasoned in Lewis that conditions warranting the imposition of a heightened standard – "tense", "uncertain" and "rapidly evolving" events – are not extant in the normal prisoner custody and involuntarily committed inpatient contexts. Id., at 853. The Lewis Court expressly ruled that "[t]he combination of a patient's involuntarily commitment and his total dependence on his custodians obliges

the government to take thought and make reasonable provisions for the patient's welfare." Id., at 852 & n.12. ***Clearly, the Petitioners cannot contend that the "shocks the conscience" standard presents a compelling question of law for this Court when it has unequivocally rejected its use in this context.***

It is also consequential to note that the "judgments" made by government officials in this case need not have been "hurried" as evidenced by the events which immediately preceded the vicious brutalization of Davis in the Seclusion Room. The First Circuit held that:

> When Rennie took Davis to the mattress, the patient was by himself in an empty room. It is difficult to see how Rennie could have reasonably perceived a threat to himself or the other MHWs standing by, all of whom could have moved out of the way or closed the door when Davis began karate kicking. Yet Rennie did not try to avert the need for force by taking such measures. Viewed in the light most favorable to the verdict, the evidence showed that Rennie provoked Davis by taunting him, and then, after the patient reacted, choked him and threw him to the mat.

Davis, 264 F.3d, at 110-111.

The First Circuit made a brilliant contextual observation about the Lewis standard in its September 5, 2001 opinion relating to the events in the Hallway which observation underscores the insubstantial nature of Petitioners' contention that the "shocks the conscience" standard is applicable to the second assault:

> The appellants argue that they similarly faced circumstances that were 'tense, evolving, and

> requiring split-second decisions,' and thus were entitled to a 'shocks the conscience' instruction. At first glance, the analogy has some appeal. Davis was drunk, possibly threatening initially, and eventually violent. However, the evidence pertaining to Davis's failure to intervene claim focused on what the MHWs and Nurse Weigers did or failed to do after Davis had been restrained [on the floor in the Hallway]. The premise of the trial court's decision to give the Gaudreault instruction was that a reasonable jury could have found that Davis had been subdued when Bragg began punching him repeatedly, allowing the appellants sufficient time and a realistic opportunity to concentrate on their primary responsibility of protecting the patient. Given this plausible view of the evidence, the appellants, unlike the police officer in Lewis, did not face competing obligations between restoring order and exacerbating disorder once Davis had been restrained. By requiring the jury to find that the defendants had sufficient time to prevent the alleged excessive use of force by Bragg, the Gaudreault standards focused properly on the factual element that removes this case from the ambit of Lewis and its 'shocks the conscience' standard. The appellants' argument to the contrary fails because it collapses the short time in which the appellants had to respond to Bragg's punching of Davis into the restraint itself. (brackets added).

Davis, 264 F.3d, at 99.

The "shocks the conscience" standard is legally inapplicable for yet anther reason. This Court expressly held in Lewis that the "shocks the conscience" standard cannot be employed when a seizure takes place. Lewis, 523 U.S., at 843, 844, 845

& n.7, 846. It is uncontested that Davis was "seized" on August 12, 1993 both in the Seclusion Room and in the Hallway abutting it. It must be recalled that seizures occur "'when there is governmental termination of freedom of movement through means intentionally applied.'" Lewis, 523 U.S., at 844 (quoting Brower v. County of Inyo, 489 U.S. 593, 597 (1989)). "A 'seizure' triggering the Fourth Amendment's protections occurs ... when government actors have, 'by means of physical force or show of authority, in some way restrained the liberty of a citizen...'" Graham, 490 U.S., at 395 & n.10 (1989) (quoting with approval Terry v. Ohio, 392 U.S. 1, 19 & n.16 (1968)).

Since the standard of liability articulated in Lewis is ***legally*** and ***contextually*** foreclosed from being applied in this context it necessarily follows that no compelling question of law could be presented to the Supreme Court concerning its application to Davis' excessive force claims. The standard "left standing" is the objectively reasonable standard. The Petitioners sought a charge only upon "deliberate indifference" – which they subsequently waived – and "shocks the conscience".

IV. THIS COURT WOULD NOT POSSESS JURISDICTION OVER ANY CLAIM OF JURY INSTRUCTION ERROR RELATIVE TO A FAILURE TO CHARGE ON ANY INSTRUCTION OTHER THAN THE "SHOCKS THE CONSCIENCE" INSTRUCTION

There were only three standards bandied about in the District Court: "deliberate indifference", "objectively reasonable" and "shocks the conscience". The First Circuit expressly ruled that each Petitioner waived any right to claim appellate error concerning any alleged failure to charge on the "deliberate indifferent" standard because each of them failed to

comply with the dictate of Fed. R. Civ. P. 51. The referenced rule states, in pertinent part, that "'[n]o party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection'". Id.; Davis, 264 F. 3d, at 100-102.

In Sections I and III of their Petition the Petitioners urge this Court to grant the Petition for a Writ of Certiorari so this Court will have the ability to analyze the propriety of a variety of standards which the Petitioners contend might well be applicable to the instant case. These standards include, but are not limited to, the "professional judgment standard", the "conscience indifference amounting to gross negligence standard", the "make a difference standard" and the "deliberate indifferent" standard. However, the Petitioners never requested the District Court, consonant with the dictate of Fed. R. Civ. P. 51, to charge the jury on any one of these standards. Thus, the Petitioners are without a legal footing to propose that certiorari be granted to consider the applicability of any one of these standards.

The Petitioners' waiver of the "deliberately indifferent" standard left only two standards standing at the end of the day - "shocks the conscience" and "objectively reasonable". It has been demonstrated in the preceding sections that the "shocks the conscience" standard is legally and contextually foreclosed from being applied and that the "objectively reasonable" standard was the one and only standard which could have been utilized in this case.

The question which the Petitioners seek to present, concerning psychological injury in an excessive force context, must also fail because of the dictate of Fed. R. Civ. P. 51. Question 2 presented in the Petition is as follows:

> Whether a constitutional violation for use of excessive force upon the involuntarily committed inpatient can arise where the resulting injury to the patient is solely psychological in nature.

The Petitioners failed to request that the District Court charge upon the contention, although not borne out in the case law, that only physical injury can serve as the basis to prevail upon an excessive force claim. The Petitioners' failure in this regard is the death knell to their ability to present this issue to this Court.

V. THE CONTENTION THAT THERE WAS ONLY "DICTA" IN ONE FIRST CIRCUIT CASE WHICH COULD HAVE SERVED TO PUT THE PETITIONERS "ON NOTICE", IN TERMS OF QUALIFIED IMMUNITY ANALYSIS, CONSTITUTES AN INTENTIONAL AND GROSS MISCHARACTERIZATION OF THE LAW

The First Circuit, like the District Court before it, ruled that mental health care workers and nurses had the duty to intervene because such a duty had been imposed previously upon police officers and prison guards both of whom are responsible for the custodial care of individuals whose rights are not even equivalent to those possessed by involuntarily committed inpatients:

> Fitzpatrick, Gillis, Hanlon, Rennie, and Tassone also reasonably may be expected to have known that the principles governing failure to intervene claims laid out in Gaudreault applied in these circumstances to them as Bragg's co-workers. Indeed, a finding that any of the appellants were shielded by qualified immunity where a police officer or prison guard would not have been would place Davis at a disadvantage vis a vis

> pretrial detainees and prisoners in asserting his constitutional rights as a mental patient. As we have discussed, such a result is at odds with the Supreme Court's statement that involuntarily committed patients are entitled to greater protection than those 'whose conditions of confinement are designed to punish'. Youngberg, 457 U.S., at 321-22.

Davis, 264 F.3d, at 114-115.

The First Circuit cited Gaudreault, 923 F.2d 203; O'Neil v. Krzeminski, 839 F.2d 9, 11 (2nd Cir. 1988) and Byrd v. Brishke, 466 F.2d 6, 10 (7th Cir. 1972) for the proposition that police officers and prison guards have a duty to intervene when another officer/guard employs excessive against those in custody. It then quoted the pertinent holding from its 1990 decision in Gaudreault: "'[a]n officer who is present at the scene and who fails to take reasonable steps to protect the victim of another officer's use of excessive force can be held liable under section 1983 for his nonfeasance.'" Davis, 264 F.3d, at 98 (quoting Gaudreault, 923 F.2d, at 207 & n.3.). The First Circuit noted in Davis that "[a]lthough this statement is dicta, Gaudreault cited two cases in which other circuits have held squarely that police officers have a duty to intervene when they see another officer use excessive force against a pretrial detainee." Id., 264 F.3d, at 98. The Petitioners contend that the Gaudreault footnote was insufficient to place them on notice – for qualified immunity purposes – because it was only dicta and because it was the only authority within the jurisdiction where the Davis case was tried which imposed an obligation to intervene upon the police. The Petitioners are in gross error.

It is respectfully submitted that the Petitioners intentionally misrepresented the state of First Circuit

precedent[6] when they contended in their Petition that Gaudreault was the only case decided in the First Circuit[7], prior to the incident date (8/12/93), which compelled police officers to intervene when one of their own is physically abusing an arrestee or pre-trial detainee. One need go no further than the Gaudreault footnote itself to demonstrate the intentional nature of the Petitioners' misrepresentation in this regard. Footnote 3 on page 207 of the Gaudreault opinions reads as follows:

> An officer who is present at the scene and who fails to take reasonable steps to protect the victim of another officer's use of excessive force can be held liable under section 1983 for his non-feasonance. *See O'Neil v. Krzeminski*, 839 F.2d 9, 11 (2nd Cir. 1988); *Byrd v. Brishke*, 466 F.2d 6, 10 (7th Cir. 1972); *Hathaway v. Stone*, 687 F. Supp. 708, 712-713 (D. Mass. 1988).

Moreover, on October 3, 2001 Davis filed an opposition to the Petitioners' motion to stay the issuance of the mandate to be issued by the First Circuit. The referenced opposition contains a two page analysis concerning Hathaway v. Stone, 687 F.Supp. 708, 712-713 (D. Mass. 1988).

In Hathaway, an arrestee asserted that officers had an obligation to intervene to stop a fellow officer from employing excessive force against her. The United States District Court for the District of Massachusetts relied upon Clark v. Taylor, 710 F.2d 4, 9 (1st Cir. 1983) and Byrd, 466 F.2d 6, amongst other cases, in

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[6] There has never has been a requirement, for qualified immunity purposes, that the clearly established nature of a legal obligation can only result from a Court of Appeals opinion.

[7] The First Circuit consists of Massachusetts, Rhode Island, Maine and New Hampshire.

deciding that an obligation to intervene existed.[8] The District Court's holdings were as follows in Hathaway:

> Liability may be imposed under §1983 upon one who has a duty to act to prevent a deprivation of another's constitutional rights, and who fails to do so in reckless disregard of the other's constitutional rights. *Clark v. Taylor,* 710 F.2d 4, 9 (1st Cir. 1983). Thus, courts have held that a police officer who fails to prevent the use in his presence of excessive force by another officer may be held liable under §1983. *See, e.g. Byrd v. Brishke,* 466 F.2d 6 (7th Cir. 1972); *Bruner v. Dunaway,* 684 F.2d 422 (6th Cir. 1982); *Bibbo v. Mulhern,* 621 F.Supp. 1018. Therefore, assuming Officer Stone was using unconstitutionally excessive force, Officers Baird and Reed may be held liable if they were present when the plaintiff was beaten, they knew that such force was being used, and they failed to stop Officer Stone from using such force. The plaintiff alleges that Reed and Baird were present when Stone allegedly dragged her from the patrol car and kicked her. The plaintiff also alleges that the officers saw Stone assaulting her. Not only did the officers fail to stop Stone, they allegedly threatened Gumes when he tried to get them to protect the plaintiff. At the time the events took place, the law concerning an officer's duty to protect prisoners from another officer's use of excessive force was clearly established. *See, e.g., Byrd v. Brishke,* 466 F.2d 6; *Bruner v. Dunaway,* 684 F.2d 422. Moreover, a reasonable officer who saw another officer drag an arrestee from a car,

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8 Hathaway was obviously decided prior to Graham. Thus, its substantive standards must succumb to Graham's analysis in this regard. However, this does not impact the clearly established nature of the obligation to intervene as articulated in Hathaway.

> throw her to the ground, and begin to kick her, as the plaintiff alleges, would realize that he was under a duty to stop the assault. Therefore, Reed and Baird are not entitled to immunity. (emphasis added).

Hathaway, 687 F. Supp., at 712-713 (emphasis added).

It is clear that Petitioners' central qualified immunity contention – i.e. that no case in the District of Massachusetts squarely held that a police officer must intervene to stop one of his own from employing excessive force upon an arrestee or pre-trial detainee – is wholly untrue given the 1988 decision in Hathaway, 687 F.Supp., at 712-713. Davis will next demonstrate that, separate and apart from Gaudreault and Hathaway, the obligation to intervene in the present context has as its genesis Supreme Court precedent that predated the incident by 11 years.

The Supreme Court has held that freedom from violations of one's personal security dates back to the 39th Article of the Magna Carta and, thereafter, to the adoption of the Fifth Amendment in 1791. Ingraham v. Wright, 430 U.S. 651, 672-674, 673 & n.41 (1977). Moreover, the Supreme Court had occasion to specifically address the rights of involuntarily committed psychiatric inpatients in its 1982 Youngberg decision. The Youngberg Court noted that "the right to personal security constitutes a 'historic liberty interest' protected substantively by the Due Process Clause". Youngberg, 457 U.S., at 315 (quoting Ingraham, 430 U.S., at 673). The Youngberg Court reconfirmed that "'[l]iberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause...'" Id., at 316 (quoting Greenholtz v. Inmates of Nebraska Penal & Correctional Complex, 442 U.S. 1, 18 (1952)). The "state also has the unquestioned duty to provide

reasonable safety for all residents ... within the institution". Youngberg, 457 U.S., at 324. Inpatients at mental institutions "enjoy[] constitutionally protected interests in conditions of reasonable care and safety, reasonable non-restrictive confinement conditions and training..." Id., at 324. Inpatients certainly have "liberty interests in ... freedom from bodily restraint". Id., at 319.

This Court noted in DeShaney v. Winnebago County Department of Social Services, 489, U.S. 189, 200 (1989) that:

> In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf – through incarceration, institutionalization, or other similar restraint of personal liberty – which is the 'deprivation of liberty' triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.

The express holdings of DeShaney and Youngberg would be rendered wholly meaningless if medical staff had no obligation to intervene when fellow staff members physically abused involuntary inpatients in their presence. It must be recalled that:

(A) "[A] general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though 'the very action in question has [not] previously been held unlawful.'" United States v. Lanier, 520 U.S. 259, 271 (1997). (quoting Anderson v. Creighton, 483 U.S. 625, 640 (1987)) (brackets in original)).

(B) "[G]eneral statements of the law are not inherently incapable of giving fair and clear warning..." Lanier, 520 U.S., at 271.

(C) "In some circumstances, as when an earlier case expressly leaves open whether a general rule applies to the particular type of conduct at issue, a very high degree of prior factual particularity may be necessary." Id.

(D) "In sum ... civil liability under §1983 ... may be imposed for deprivation of a constitutional right if, but only if, 'in light of pre-existing law the unlawfulness [under the constitution is] apparent.'" Id. (quoting with approval Anderson, 483 U.S., at 640, brackets in original).

These principles dictate that Youngberg compelled intervention by medical staff because its rights could not exist without imposing the concurrent obligation to intervene. How could the State "provide reasonable safety for all residents ... within the institution..." if staff could abuse patients in front of staff? Youngberg, 457 U.S., at 324. It could not.

Even if Gaudreault's central holding were obiter dicta it would be irrelevant because the obligation to intervene was clearly established under DeShaney, Youngberg and Hathaway as articulated above. Davis respectfully submits, however, that the central Gaudreault holding – i.e. "[a]n officer who is present at the scene and who fails to take reasonable steps to protect the victim of another's use of excessive force can be held liable under §1983 for his nonfeasance" – is not obiter dicta. Id., 923 F.2d, at 207 & n.3. Obiter dicta has been defined as holdings which are "wholly unnecessary to the disposition of the case[]" and made "merely by way of illustration". Brush v. Commissioner of Internal Revenue Service, 300 U.S. 352, 373 (1937).

It is manifest that the First Circuit was called upon in Gaudreault to initially determine whether or not a pre-trial detainee had a constitutional right to assert an intervention claim against police officers who permitted a fellow police officer to assault him. The First Circuit not only established such a right but, in addition, made the determination as to what elements must be satisfied to prevail upon such a claim. It is respectfully submitted that these holdings in Gaudreault were holdings which were "wholly necessary" to the disposition of Gaudreault's intervention claim and that such holdings were not made "merely by way of illustration". Brush, 300 U.S., at 373. The articulation of the ability to assert an intervention claim and the annunciation of the elements germane to same were absolutely necessary to the disposition of Gaudreault's contention that he had a right to assert an intervention claim. Gaudreault, 923 F.2d, at 207 & n.3. In fact, the conclusion that Gaudreault could not assert an intervention claim, because the attack was "over in a matter of seconds", necessarily compelled the First Circuit to first find that an intervention claim was feasible and then define the substantive elements of such a claim. It was only after the Court defined the elements of the intervention claim that it decided that Gaudreault did not have one.

The Petitioners cite Wilson v. Layne, 526 U.S. 603 (1999) for the proposition that a constitutional right is not clearly established where the Plaintiffs are unable to cite any controlling authority ***in their jurisdiction*** which clearly established the rule upon which they sought to rely. Nowhere in Wilson does the Supreme Court state that the law clearly establishing a constitutional right must be from that particular jurisdiction. However, such a requirement was not problematic here as demonstrated above.

The Wilson case transpired in Maryland yet the Trial Court reviewed and the Supreme Court sanctioned the review of Wisconsin, Ohio and California law to determine if the right was "clearly established". Id., 526 U.S., at 614-618. The Supreme Court reviewed the law in many other jurisdictions as well in Wilson. Id. Many courts, including the First Circuit in Davis, review the law of other jurisdictions to demonstrate that a legal right is "clearly established".

There is no substantial question of law relative to the obligation of mental health care workers and nurses to intervene when an involuntarily committed inpatient is being subjected to excessive force by fellow staff members. This result obtains simply because Youngberg "clearly established" such an obligation as did Gaudreault, Hathaway and cases cited therein.

VI. THE PETITIONERS ARE ACTUALLY WITHOUT THE ABILITY TO EVEN ASSERT THE DEFENSE OF QUALIFIED IMMUNITY

In the fourth section of their Petition the Petitioners contend that "this Court should reverse the judgments against the Petitioners and find that they are entitled to qualified immunity for the claim that they violated Davis' constitutional rights by failing to timely intervene to prevent Bragg's assault". It was demonstrated in the preceding section that the law was, at all times, "clearly established" and such that it would have put a reasonable public official on notice as to what type of conduct was proscribed. See Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); Hathaway, 687 F.Supp., at 712-713; Gaudreault, 923 F.2d, at 207 & n.3; Davis, 264 F.3d, at 102-103. The "clearly established" nature of the applicable legal principles dictates that the defense of qualified immunity is not viable in this context as the First

Circuit made clear. However, it is actually clear that each of the Petitioners are foreclosed, as a matter of law, from even asserting the defense of qualified immunity given the imposition of punitive damages against each of them.

The good faith qualified immunity standard has been repeatedly articulated by the Supreme Court. "[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow, 457 U.S., at 818 (1982)[9]. Immunity "generally turns on the 'objective legal reasonableness' of the action ... assessed in light of legal rules that were 'clearly established' at the time it was taken..." Anderson, 483 U.S., at 639 (citation omitted). Public officials will be immunized only in the event that their actions are "'taken in the good-faith fulfillment of their responsibilities and within the bounds of reason...'" Procunier v. Navarette, 434 U.S. 555, 562 (1978) (citation omitted). Thus, qualified immunity has as its predicates the requirements that the public official act in good faith, within the bounds of reason and in a manner which is objectively legally reasonable.

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[9]Harlow, 457 U.S., at 815-821 overruled Wood v. Strickland, 420 U.S. 308, 318-322 (1975) only to the extent that Wood sanctioned the employment of subjective criteria to discern whether or not a public official was entitled to immunity. Wood had sanctioned both a subjective and an objective analysis in making the determination as to whether or not the defense of qualified immunity was viable. Id., at 318-322. However, the holdings in Wood and its progeny, which were unrelated to the "subjective aspect" of the qualified immunity defense, were specifically embraced and left undisturbed by Harlow. Id., at 815-821.

It has long been the law that a public official will be precluded from asserting the defense of qualified immunity:

> [I]f the official 'knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of ...' others or 'if he took the action with the malicious intention to cause deprivation of constitutional rights or other injury ... the official cannot be expected to predict the future course of constitutional law ... but he will not be shielded from liability if he acts 'with such disregard of the ... [plaintiff's] ... clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith.'[10]

Procunier, 434 U.S., at 562 (citations omitted, emphasis added, brackets added); see also Harlow, 457 U.S., at 815 & n. 25; Baker v. McCollan, 443 U.S. 137, 139 (1979); Anderson, 483 U.S., at 638; Malley v. Briggs, 475 U.S. 335, 341 (1986); Tower v. Glover, 467 U.S. 914, 923 (1984); Wood, 420 U.S., at 322.

"As the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law." Malley, 475 U.S., at 341. The jury verdict dictates that each of the Petitioners, against whom punitive damages were assessed, knowingly violated the law with a "'malicious intention to cause a deprivation of

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[10]The Respondent is not unmindful of the fact that this standard was initially articulated in Wood "in the specific context of school discipline". Harlow, 457 U.S., at 815 & n. 25. However, in Harlow the Supreme Court rejected the contention that this holding was confined to the school discipline setting. "Subsequent cases ... have quoted the Wood formulation as a general statement of the qualified immunity standard." Id., at 815 & n. 25.

Constitutional rights or other injury". Procunier, 434 U.S., at 562 (citation omitted); see also Harlow, 457 U.S., at 815 & n.25. The defense of qualified immunity is clearly not one which these Defendants may assert in this context given the fact that their intentional conduct was found by the jury to have been outrageous, malicious, callous, wanton and prompted by ill will. Certainly, conduct cannot be characterized as having been undertaken in "good faith" and in an "objectively legally reasonable" manner when a jury previously found it to have been of the type committed by the Petitioners here. See Procunier, see also Harlow; Baker; Anderson; Malley; Tower.

VII. THE PETITIONER, PAUL RENNIE, LABORS UNDER A VARIETY OF LEGAL AND FACTUAL MISCONCEPTIONS RELATIVE TO THE EXCESSIVE FORCE CLAIM EMANATING FROM THE SECLUSION ROOM RESTRAINT

The Petitioner, Paul Rennie, contends that "solely psychological" injury was sustained by Davis, as a result of the Seclusion Room Restraint, dictating that the claim is not legally viable. This contention fails for a variety of reasons. It is initially of moment, however, to point out that the First Circuit ruled that the evidence was sufficient to independently find Rennie liable for the "restraint" taking place in the Hallway abutting the Seclusion Room. The First Circuit, after reviewing the entire record, concluded that the jury acted reasonably when it determined that Rennie was involved in the Hallway Restraint:

> [B]ased on Tassone's and Davis's testimony, a reasonable jury could have found that Rennie participated in the hallway restraint and so must have seen Bragg's use of excessive force. While Tassone said that he could not be sure that Rennie was holding Davis's arm, he did not

> retract his testimony. Davis also said that he thought Rennie was involved. The jury was thus faced with competing accounts of Rennie's participation, and we cannot say that its choice to credit Tassone's and Davis's accounts over Rennie's self-serving account was unreasonable.

Davis, 264 F.3d, at 103-104.

That physical injuries were received by Davis during the Hallway Restraint is also clear as was held by the First Circuit:

> Davis testified about the punching: 'It was over and over and over and over again. It was like it would never stop. ...And then I was calling for help and nobody was stopping them and they kept hitting me ... I felt the blood; it was, you know, it was coming down my face.' Plesh said that Davis's 'eyes were rolling out of his head,' that '[t]here was swelling, bruising all in his face,' and that he checked to make sure that Davis's neck had not been broken. Tassone said that Davis's face was cut and bloody.

Id., at 94.

Thus, Rennie's liability can be independently predicated upon the Hallway Restraint which necessarily dictates that Rennie could not present any issues of moment relative to the Seclusion Room Restraint.

The Respondent now addresses Rennie's contentions regarding the Seclusion Room Restraint. The First Circuit expressly found that excessive ***physical*** force was employed by Rennie in the Seclusion Room against Davis:

> Davis presented substantial evidence that Rennie used excessive force during the physical restraint in the quiet room. As we have said, Davis testified that he started doing karate kicks into the air in response to Rennie's and Bragg's taunts, and that Rennie then choked him and threw him to the mat. Davis said: 'That was an assault ... What Paul Rennie had done, grabbing someone by the neck and throwing them down is not a restraint.'

Davis, 264 F.3d, at 110.

Rennie assumes, sub silentio, that a physical discernable injury must be present to substantiate the viability of an excessive force claim. The Supreme Court has never conditioned excessive force claims upon an antecedent demonstration that physically discernable injuries result from its use. See Graham, 490 U.S. 386-400 (1989). Instead, Graham only requires that an assessment be made as to the objective reasonableness of the force employed in light of "the facts and circumstances confronting [the state employee]..." Id., at 379. Recent precedent of the Supreme Court in Hudson v. McMillian, 503 U.S. 1 (1992) supports the contention that claimants need not demonstrate physically discernable injuries to prevail on excessive force claims. The Hudson Court held that it may "be proper to evaluate the need for application of force, the relationship between that need and the amount of force used, the threat reasonably perceived by the responsible officials, and any efforts made to temper the severity of a forceful response". Id., at 7. (internal quotation marks omitted). Blood or bruising is not now and never has been a condition precedent to the assertion of a viable excessive force claim. This is, indeed, sensical since the most brutish of force may not even produce a physically discernable injury.

Davis' Seclusion Room excessive force claim draws impenetrable support from existing Supreme Court precedent without consideration of any "psychological" injury. The First Circuit noted that the facts and circumstances confronting Rennie were not such that he could have legally done what he did:

> When Rennie took Davis to the mattress, the patient was by himself in an empty room. It is difficult to see how Rennie could have reasonably perceived a threat to himself or the other MHW's standing by, all of whom could have moved out of the way or closed the door when Davis began karate kicking. Yet Rennie did not try to avert the need for force by taking such measures. Viewed in the light most favorable to the verdict, the evidence showed that Rennie provoked Davis by taunting him, and then, after the patient reacted, choked him and threw him to the mat.

Davis, 264 F.3d, at 110-111.

The Respondent does not deny that the First Circuit attributed some of the psychiatric harm which Davis sustained to the First Restraint which occurred in the Seclusion Room. It noted that it "would be artificial, if not impossible, to attempt to separate the psychological harm suffered as a result of one restraint as opposed to the other. The jury thus could have attributed some of Davis's mental injury to Rennie's use of excessive force to unreasonably restrain Davis during the quiet room restraint." Davis, 264 F.3d, at 111. This assessment of the psychological harm sustained by Davis is actually surplusage though because a viable excessive force claim can be entirely predicated upon the physical force which Rennie employed against Davis as depicted above.

It is apparent that this Court need not grant certiorari in order to determine, in the context of this case, whether a "solely psychological" injury is compensable as a result of the employment of excessive force. Since there need not be any physically discernable injury it is clear that Davis' excessive force claim can be entirely predicated upon the vicious physical attack by Rennie on Davis in the Seclusion Room without consideration of any other evidence. Rennie is also independently liable for events occurring in the Hallway.

CONCLUSION

There is no compelling reason to grant certiorari because no important or substantial legal questions have been raised in the Petition[11].

It is respectfully requested that the Petition for a Writ of Certiorari be denied.

Respectfully Submitted,

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[11] It should be noted that one of the joint tortfeasors, Nicholas L. Tassone, recently paid the compensatory claim ($100,000.00) and all associated interest.